In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1269

UNITED STATES OF AMERICA, APPELLANT

v.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, SECURITY TRUST COMPANY, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OPPOSING MOTION TO AFFIRM

In their motion to affirm, appellees contend that their merger "was consummated in good faith reliance upon the publicly announced policy of the Department of Justice" (p. 15). While their contention is not directly related to the merits of this appeal, we deem it appropriate to note that it is, in any event, unfounded.

Appellants were on notice of the government's view that the merger was illegal before it was consummated. The complaint challenging the merger was filed on July 7, 1965. The government's request for a preliminary injunction was denied on July 14, 1965, at 4:30 p.m.

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and the merger was consummated a half hour later. Thus, the merger was consummated with full knowledge that the government believed it to be illegal.

The "policy statement" upon which the banks claim to rely was testimony of the Assistant Attorney General in Charge of the Antitrust Division before a congressional committee to the effect that a bank merger would normally not be challenged unless two of the three federal banking agencies agreed that the merger was bad. He never suggested that this was an inflexible rule, to be followed in every case regardless of circumstances. On the contrary, on May 14, 1965, three and a half weeks after he had testified, he expressly stated in a letter to the chairman of the committee:

> I should like to add that what I said about the impact of banking agency merger reports on antitrust action was intended only to emphasize the substantial weight that I believe should be given to these reports in our deliberations. I do not believe that such reports could ever relieve the Department of Justice from exercising its own enforcement discretion in what it deems to be the public interest, and to avoid any possible misinterpretation of my remarks, I would appreciate your including this statement in the record of the hearings. [*Economic Concentration*, Report of Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, pursuant to S. Res. No. 40, 89th Cong., 1st Sess., Pt. 2, p. 880 (1965).]

At all events, it is plain that appellants did not, in fact, rely on the "policy statement" in planning, agree-

ing to, or consummating the merger. The statement was made on April 21, 1965, and preparations to merge had already been made by that date. Moreover, the merger agreement was signed on April 29, before an application for permission to merge was filed with the Comptroller of the Currency on April 30, and thus before the other banking agencies could have expressed their views and the banks could have known whether two of them would concur in the view of the Department of Justice. Finally, any uncertainty as to the government's position on the legality of the merger was removed when the government, well in advance of consummation, filed its complaint and asked for a preliminary injunction restraining consummation.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* MERCANTILE TRUST CO. NATIONAL ASSOCIATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 87. Decided October 16, 1967.

PER CURIAM.

The judgment is reversed and the case is remanded for further proceedings consistent with the opinion of this Court in *United States* v. *First City National Bank of Houston*, 386 U. S. 361.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.